United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

4726

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of:

HARRIET UNDERWOOD SYMONDS, Deceased

EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,

Appellant

and

JOHN J. TOOMEY,

Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 18 1969

Nathan J. Paulson
CLERK

ALVIN O. WEST
Attorney for Executor
815 15th Street, N.W.
Washington, D.C.

JOHN J. TOOMEY
Attorney for Guardian ad Litem
10400 Connecticut Avenue
Kensington, Maryland
Attorneys for Appellees

STUART H. ROBESON
1828 Jefferson Place, N.W.
Washington, D.C.
659-2720
Attorney for Appellant

Washington, D.C. THIEL PRESS 202 393-0826

TABLE OF CONTENTS

Last Will and Testament of Harriet Underwood Symonds 1
Order for Probate and Letters Testamentary 4
Petition of Executor for Instructions 6
Affidavit by Amicus Curiae 11
Answer to Petition for Instructions by Julia R. Leach 13
Answer of Ernest Underwood to Petition of Executor 13
Answer of John J. Toomey, Guardian ad Litem 16
Additional Points and Authorities by Julia R. Leach 18
Memorandum Order 21

LAST WILL AND TESTAMENT

OF

HARRIET UNDERWOOD SYMONDS

FILED

MAR 27 1969

I, Harriet Underwood Symonds, 2322 - 37th Street, N.W., Washington 7, D. C., do hereby make, publish and declare this writing as and for my last will and testament, hereby revoking any and all wills heretofore made by me.

Item I. I nominate and appoint my nephew Edward Underwood Elam, 702 Yadkin Street, Kingsport, Tennessee, to be the executor of this my last will and testament. I specifically authorize him as such to have the right and power to dispose of and/or sell any and all of my real or personal property and estate and to make such distribution of my estate as I have hereafter set forth.

Item II. I direct that my executor shall have full and unrestricted discretionary authority to take, collect, sue for, compromise, adjust, sell, assign, transfer, convey, deliver, contract with respect to, or otherwise deal with, without application to or order of Court, any property, real or personal, constituting a part of my estate, without any duty upon any person dealing with it to see to the application of any money or other property delivered to it; and to pay, compromise or adjust any claim or liability; and generally to have such powers with regard to the assets of the estate as an individual has with respect to his own property.

Item III. I specifically (but without limitation thereto) authorize the payment of all inheritance taxes, real estate and income taxes, just debts, funeral, burial and head-

stone expenses out of my estate. I authorize the payment out of the proceed of my estate, of money to my executor to reimburse him for all expenses incurred in the settlement of my estate, and the payment to him as an allowance for services as my executor, without the necessity of obtaining the consent of any distributees or beneficiaries.

Item IV. I direct that my executor first attend- to the payment of the expenses of my funeral, burial and headstone. I authorize my executor to expend up to $1,000 for funeral, burial and headstone expenses.

Item V. I direct my executor to give away to members of the family and blood and marriage relatives and to the minister of the Dumbarton Avenue Methodist Church personal items including furniture and furnishings according to his best judgment of my wishes.

Item VI. All the rest and residue of my estate I direct my executor to sell or otherwise convert to cash and to pay out the proceeds (after deducting all of the above costs and expenses):

(a) $10,000 (Ten thousand dollars) to the Trustees of the Dumbarton Avenue Methodist Church, Washington, D. C.

(b) Up to Five Hundred dollars ($500) for a new headstone for the grave of my great grandfather Israel Underwood in the cemetery at Ephrata, New York.

(c) An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death:

(i) The children (or their estates if they are deceased at my death) of Edward U. Elam, Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood, these these named persons being nephews and a niece. If anyone of these children is under 18 years of age at my death, the sum due him (or her) is to be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years.

(ii) Robert L. Leach
2407-37th St. N.W.
Washington 7, D. C.

or his wife if he is dead at the time of my death.

(iii) Anne Reed
4828 Reservoir Road N.W.
Washington 7, D. C.

IN WITNESS WHEREOF, I have now subscribed my name to this my last Will and Testament, this 30th day of January, 1964.

Harriet Underwood Symonds
Harriet Underwood Symonds

Signed, Published and Declared as and for her Last Will and Testament by Harriet Underwood Symonds, the above named Testatrix, in the presence of us who in her presence and at her request, in the presence of each other, now subscribe our names as attesting witnesses.

Miss Isabel Rathmell
Name

3536 T St N.W.
Address

Name

3026 - "O" St. N.W.
Address

Administration

[Caption Omitted in Printing]

ORDER FOR PROBATE AND LETTERS TESTAMENTARY

APR 29 1968
Clerk of Probate Court

Upon consideration of the petition of Edward Underwood Elam for probate and for letters testamentary filed herein on the 27th day of March, 1968, and it appearing to the satisfaction of the Court that the last will and testament of Harriet Underwood Symonds, deceased, bearing date the 30th day of November, 1964, has been duly proven, and that all the heirs at law and next of kin of said decedent have filed their consents herein, and no objections having been filed, it is by the Court this 29 day of April, 1968,

ADJUDGED, ORDERED and DECREED, that the said will be and is hereby admitted to probate and record as a will of real and personal property, and that letters testamentary ~~are~~ he granted and ~~shall~~ issue to Edward Underwood Elam, the executor named in said will, provided he first files his undertaking in the penal sum of Forty-Seven Thousand Dollars ($ 47,000.00) with surety approved by the Court, conditioned for the faithful performance of his trust, and provided he files the power of attorney required of non-residents by Sec. 20-118 of the District of Columbia Code.

Judge

INVENTORY OF MONEY AND DEBTS DUE TO DECEASED

Citizens Federal Savings and Loan Association of Georgetown	$10,000	00
Northwestern Federal Savings and Loan Association	4,739	99
National Bank of Washington, Liberty Branch, checking account	377	04
Note of Dallas F. Wallace and wife, dated June 28, 1966, in the		

original principal amount of $26,500.00, bearing interest at the rate of 6% per annum, payable in monthly instalments of $295.00, principal and interest, entire balance due June 28, 1976, secured by first deed of trust on 2322 37th Street, N.W., Washington, D.C.; principal balance as shown in Conservator's Final Account	22,911.37
Miscellaneous coins--face value of U.S. coins	10.13
TOTAL	$38,038.53

FILED
SEP 6 1968
PETER J. McLAUGHLIN
REGISTER OF WILLS, D.C.
Clerk of Probate Court
DOCKETED

STATE OF TENNESSEE }
COUNTY OF SULLIVAN } *to wit:*

I, EDWARD UNDERWOOD ELAM, Executor of the Estate of Harriet Underwood Symonds, late of the District of Columbia, deceased,

do solemnly swear that the foregoing schedule is a true and perfect inventory of all the MONEY belonging to the deceased, and of all the DEBTS due the said deceased, which have come to my hands or knowledge and that I will well and truly charge myself with all money and all and every such debt or debts as shall hereafter come to my knowledge or possession.

[signature]

Sworn to and subscribed before me this 6th day of Sept, A. D. 1968.

[signature]
Register of Wills for the District of Columbia,
Notary Public Clerk of the Probate Court.
My commission expires _____.

[Caption Omitted in Printing]

FILED

DEC 24 1956

PETITION OF EXECUTOR FOR INSTRUCTIONS

The petition of Edward Underwood Elam respectfully shows to the Court:

1. That he is the duly appointed and qualified executor of the estate of Harriet Underwood Symonds, deceased.

2. That in the course of the administration of said estate certain questions have been raised as to the interpretation of provisions of the last will and testament of said testatrix, which questions involve the distribution of the assets of the estate, and petitioner, as executor, has been advised to seek the instructions of the Court as to the distribution to be made.

3. That the portions of Item VI of said will as to which your petitioner requests instructions are as follows:

> Item VI. All the rest and residue of my estate I direct my executor to sell or otherwise convert to cash and pay out the proceeds (after deducting all of the above costs and expenses):
>
> (a) * * *
>
> (b) * * *
>
> (c) An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death:
>
> > (i) The children (or their estates if they are deceased at my death) of Edward U. Elam, Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood, these these [sic] named persons being nephews and a niece. If anyone of these children is under 18 years of age at my death, the sum due him (or her) is to be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years.

(ii) Robert L. Leach
2407-37th St. N.W.
Washington 7, D.C.

or his wife if he is dead at the time of my death.

(iii) Anne Reed
4828 Reservoir Road N.W.
Washington 7, D.C.

4. That the facts relating to the above-quoted portions of Item VI are as follows: Decedent was a widow who left no child or descendant of a child surviving, and who was predeceased by both her parents, by her brother, Arthur Underwood, and by her two sisters, May Underwood Newcomb and Grace Underwood Elam. Her only heirs at law and next of kin are the following nephews and niece, all adults and sui juris:

Children of deceased brother, Arthur Underwood:

ARTHUR F. UNDERWOOD, 155 Tree Top Lane, Rochester Michigan 48063

RAYMOND UNDERWOOD, Allentown Road, Route 2, Lansdale, Pennsylvania 19446

MARTHA UNDERWOOD PAULL, 7201 Cedar Avenue, Takoma Park, Maryland 20012

ERNEST UNDERWOOD, 2725 Wicker Street, Highland, Indiana 46322

Child of deceased sister, May Underwood Newcomb:

MELVILLE STANLEY NEWCOMB, 424 Rockaway Street, Boonton, New Jersey 07005

Child of deceased sister, Grace Underwood Elam:

EDWARD UNDERWOOD ELAM, your petitioner.

The "children * * * of Edward U. Elam, Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood," who are the beneficiaries under Item VI(c)(i) of decedent's will, are as follows, there being no such children who predeceased testatrix:

Children of Edward U. Elam, your petitioner, all of whom reside with petitioner at 702 Yadkin Street, Kingsport, Tennessee 37660:

ANNE DEUEL ELAM, a minor, born April 16, 1948

ELIZABETH UNDERWOOD ELAM, a minor, born June 25, 1951

BARBARA BROOKS ELAM, a minor, born July 31, 1962

JUDITH LEE ELAM, a minor, born October 7, 1963

Child of Arthur F. Underwood:

PATRICIA UNDERWOOD SCHMIDT, an adult and sui juris, 2131 Seventh Avenue, Pueblo, Colorado 81003

Children of Raymond Underwood:

BARBARA UNDERWOOD POSNICKS, an adult and sui juris, 23218 Martir Road, St. Clair Shores, Michigan 48080

NORMA UNDERWOOD GRASSE, an adult and sui juris, 16 Harbour Place, Souderton, Pennsylvania 18964

Children of Martha Underwood Paull:

HUGH BERNET PAULL, an adult and sui juris, 344 Old Line Avenue, Maryland City, Laurel, Maryland 20810

WILLIAM ARTHUR PAULL, an adult and sui juris, 12604 Heming Lane, Belair, Bowie, Maryland 20715

MARGARET LOUISE PAULL DOUCETTE, an adult and sui juris, 7201 Cedar Avenue, Takoma Park, Maryland 20012

DAVID ALAN PAULL, an adult and sui juris, 7201 Cedar Avenue, Takoma Park, Maryland 20012

Children of Ernest Underwood; all of whom reside at 2725 Wicker Street, Highland, Indiana 46322:

ROBERT UNDERWOOD, a minor, born May 11, 1948

PHILLIP UNDERWOOD, a minor, born June 12, 1960

CYNTHIA UNDERWOOD, a minor, born May 28, 1962

BRIAN UNDERWOOD, a minor, born July 22, 1963.

Robert L. Leach, the beneficiary named in Item VI(c)(ii) of the will, predeceased testatrix, but his wife, JULIA R. LEACH, an adult and sui juris, survived testatrix, and now resides at 6835 Nashville Road, Lanham, Maryland 20801. Anne Reed, the beneficiary named in Item VI(c)(iii) of the will, predeceased testatrix.

5. That the questions concerning the above-quoted portions of Item VI(c) of the will as to which your petition requests instructions are:

(A) Does the "equal division of the remainder" mean a division of one-half of said remainder to the 15 children who are included under Item VI (c)(i) and one-half to Julia R. Leach, widow of Robert L. Leach, the beneficiary under Item VI(c)(ii) (Anne Reed, the beneficiary under Item VI(c)(iii) having predeceased the testatrix), or does it mean a division among said 15 children and Julia R. Leach, that is, one-sixteenth of said remainder to each?

(B) With reference to the provision that the sum due any beneficiary under 18 years of age "be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years," what disposition shall be made of any interest which shall accrue on the shares of such minor beneficiaries?

(C) Of the 15 children who are beneficiaries under Item VI(c)(i), 2 are minors over the age of 18 years, one being a male and the other female, while 6 are minors who are under the age of 18 years, 2 being male and 4 female. Your petitioner proposes to distribute the share of the female over the age of 18 years directly to her, on the authority of Section 20-1906, District of Columbia Code, 1967 Ed. In the light of the provision that the sum due any beneficiary under 18 years of age "be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years,"

(1) Can the share of the male minor over the age of 18 years be paid directly to him before he reaches 21 years of age?

(2) Can your petitioner as executor, despite the quoted provision, pay out to guardians which may be appointed the respective shares of the minor beneficiaries under the age of 18 years, and thus avoid the necessity of keeping the estate open for almost 13 more years, awaiting the designated time for distribution of a relatively small portion of the estate?

6. That your petitioner also requests instructions as to Item V of said will, which provides:

Item V. I direct my executor to give away to members of the

family and blood and marriage relatives and to the minister of the Dumbarton Avenue Methodist Church personal items including furniture and furnishings according to his best judgment of my wishes.

7. That the inventory of the personal estate of testatrix includes the following items of jewelry which were appraised at the amounts stated:

Yellow gold ring set with 1 opal and 2 seeded pearls	$ 30.00
Yellow gold ring set with small diamond	175.00
White gold bar pin set with 1 diamond	25.00
Lady's yellow gold wedding band	5.00

8. As to Item V of the will, your petitioner requests instructions as to whether the jewelry listed in Paragraph 7 above comes within the phrase "personal items including furniture and furnishings" over which Item V gives your petitioner a discretionary power of distribution.

Wherefore, the premises considered, petitioner prays:

1. That notice by citation or by publication or by both as may be necessary shall issue directed to the above-named heirs at law and next of kin of testatrix Harriet Underwood Symonds, and to the above-named beneficiaries under Item VI(c) of said testatrix' last will and testament, and that a guardian ad litem be appointed to represent the interests of the minor beneficiaries Anne Deuel Elam, Elizabeth Underwood Elam, Barbara Brooks Elam, Judith Lee Elam, Robert Underwood, Philip Underwood, Cynthia Underwood, and Brian Underwood.

2. That this Court shall give instructions to your petitioner as executor as prayed in this petition, for petitioner's guidance in making distribution of the residue and remainder of this estate.

3. That petitioner shall have such other and further relief as the nature of the case may require and to this Honorable Court shall seem meet and proper.

[Subscription Omitted in Printing]

Edward Underwood Elam

Edward Underwood Elam

[Caption Omitted in Printing]

FILED

JAN 9 1969

AFFIDAVIT BY AMICUS CURIAE RE PETITION OF EXECUTOR FOR INSTRUCTIONS; EXECUTED DECEMBER 17th, 1968

Now comes Raymond Underwood as amicus curiae who being duly sworn deposes and states as follows:

I am the Raymond Underwood who is named on page 2 of the above entitled Petition which is filed in this case.

I have been a member of this Honorable Court for 30 years.

I am the person who wrote for Mrs. Symonds at her request the will under consideration by this Court. I was in constant communication with her during the years 1960 to 1965 as I stayed at her home overnight every month or two during those years because my business took me to Washington at least that often. During those visits with her she almost always talked about the provisions of her past and proposed new wills. The will now under consideration was the last one she asked me to prepare. It bears the date of November 30, 1964.

I prepared the will to clearly set forth her intention that the remainder monies be evenly divided on the basis of the individuals and not on the basis of their groups. Thus, if the total number if individuals to share the remainder were e. g., 16 persons, the remainder was to be divided into 16 equal parts.

I prepared the will to make it clear that the remainder was not to be divided on the basis of the groups, the groups being those named in the will, namely, (i) family relatives, (ii) neighbors, and (iii) a devoted nurse to her and to her husband, the nurse not being a neighbor. The individuals

came within these three obvious classes and the groups were set forth merely to identify and indicate this. She never mentioned dividing the remainder on the basis of groups and it was her clear intention that the remainder be divided on the basis of the individuals as a total sum of the persons to share the remainder.

Therefore, as to 5(A)of the Petition I submit that the Will clearly sets forth her intention that the remainder be divided equally among the individuals entitled to share it.

As to 5(B) I state that it was her intention that no interest be paid to the minor beneficiaries so that it would be impossible for them to assert when they did get the money that the executor failed to obtain the highest possible interest rate. The executor was not required to augment the money with interest and could in-deed place it in an ordinary checking account without interest. He was to be entirely free of worry about any or the best interest.rate.

As to 5(C)(2) it was her absolute intention that no parent or other guardian of any beneficiary, whether a minor or adult, receive any money on behalf of the beneficiary. The will clearly states that the executor is not to pay out any money to anyone other than the beneficiary directly and then only if 18 years old, this being her absolute intention. She wanted to make certain that the benefic-iary got the money and was not concerned about the estate keeping ope

I will make a personal appearance if this is desired.

Raymond Underwo

Commonwealth of Pennsylvania } SS
County of Montgomery

Before me this 6th day of January 1969 appeared the above named Raymond Underwood who signed the instrument in my presence and made oath before me that the statements made therein are true.

Notary public Margaret Templeton

Commission Expires 4/1/72

[Caption Omitted in Printing]

ANSWER TO PETITION FOR INSTRUCTIONS BY JULIA R. LEACH, LEGATEE

FILED
FEB 11 1969

Comes now Julia R. Leach, wife of Robert L. Leach, deceased, and moves that this Court instruct that the said Julia R. Leach receive one-half of the proceeds in Item VI (c)(ii), for the following reasons:

1. From the four corners of the will Item VI (c) sets up three classes or groups: One group (c)(iii) has died leaving only two groups for dividing the remainder.

2. To rule that it was not a group would be rewriting the will, and would be contrary to the very simple and clear language of the will.

3. And for such other reasons as may be advanced at time of this hearing.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ANSWER OF ERNEST UNDERWOOD to PETITION OF EXECUTOR FOR INSTRUCTIONS

FILED
FEB 17 1969

ERNEST UNDERWOOD, an adult and sui juris, for his answer to Executor's Petition for Instructions filed herein, says that:

1. He is the father and natural guardian of ROBERT UNDERWOOD, PHILIP UNDERWOOD, CYNTHIA UNDERWOOD, and BRIAN UNDERWOOD, minors, and who are the beneficiaries under Item VI (c) (i) of decedent's Will.

2. The language of the Will concerning Item VI (c) "equal

division of the remainder" clearly indicates and imports that the division shall be equally among the 15 children of EDWARD U. ELAM, ARTHUR F. UNDERWOOD, RAYMOND UNDERWOOD, MARTHA UNDERWOOD PAULL, ERNEST UNDERWOOD, and JULIA R. LEACH, that is, one-sixteenth (1/16th) each. There is no language in the Will susceptible of any other interpretation. In the absence of any such language, it must be construed that the Testatrix intended an equal division among all the beneficiaries named in said Item VI (c). There was no intention, either express or implied, that the division should be made by classes or groups of beneficiaries.

3. With respect to the matters contained in Rhetorical Paragraph 5 (c) (1) and (2), this Petitioner desires that the Court determine and decree that the respective shares of all minor beneficiaries be distributed and paid over to the legally appointed guardians of such minor beneficiaries.

(A) Such payment and distribution would avoid the necessity of keeping the decedent's estate pending beyond the normal statutory period allowed for administration, thus eliminating additional court costs, bond premiums, and Executor's and attorney's fees. This consideration is particularly significant in the light of the fact that the respective shares were to be retained by the Executor without yielding any interest.

(B) It would be manifestly unjust to the beneficiaries

for the Executor to retain the distributive shares in a non-interest-bearing checking account as suggested in the affidavit filed herein by RAYMOND UNDERWOOD, amicus curia.

(C) The Testatrix was ill-advised to provide for the retention of the distributive shares by the Executor until each beneficiary attains the age of 18 years. The Court is awares that all jurisdictions in this country surround and protect the estates of minors with adequate safeguards for their preservation through court-appointed guardians. In all jurisdictions, the statutes provide for placement of guardianship funds in interest-earning investments and for disbursement of funds only upon court order.

This Petitioner desires that this Court determine and decree that the distributive shares of the minor beneficiaries be paid over to court-appointed guardians in their respective jurisdictions. Upon such decree and determination, this Petitioner will apply to the probate court here in Indiana for the appointment of some qualified person, bank, or trust company as Guardian of his children.

WHEREFORE, Petitioner asks judgment and order that:

1. The residuary estate of the decedent herein under Item VI (c) be divided equally per capita and not by class or group among the beneficiaries therein named;

2. Payment and distribution of all minor beneficiaries be made to their legally-appointed guardians in their respective jurisdictions; and

3. Such other and further relief as to the Court may seem appropriate.

Ernest Underwood
2725 Wicker Street
Highland, Indiana

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ANSWER OF JOHN J. TOOMEY, GUARDIAN AD LITEM TO PETITION OF EXECUTOR FOR INSTRUCTIONS REG

FILED
MAR 6 1969
Probate Court

JOHN J. TOOMEY, a member of the Bar of this Court states as follows:

1. He was appointed guardian ad litem by order of this Court dated January 24, 1969, to represent the interests of the following minor children: Anne Deuel Elam, Elizabeth Underwood Elam, Barbara Brooks Elam, Judith Lee Elam, Robert Underwood, Philip Underwood, Cynthia Underwood, and Brian Underwood, who are beneficiaries under the will of the above decedant.

2. That as a result of said appointment, your guardian ad litem examined the file of this case to determine for himself the reason for the appointment and to acquaint himself with the language of the will which created the controversy now pending.

3. That as a result of said examination, your guardian ad litem is of the opinion that the balance of cash or other personal property passing through Item VI, Subparagraph (c) should pass equally among the fifteen (15) children of Edward U. Elam, Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood as well as to Julia R. Leach, surviving wife of Robert L. Leach. In other words, the fifteen children and Julia R. Leach should receive the same amount, one-sixteenth (1/16) each.

4. That your guardian ad litem is of the opinion that it would be wasteful and unbusinesslike for the executor to keep this estate proceeding open once

the question of shares to beneficiaries ha: been decided, especially since it will be another twelve years before the youngest of the minor children, Brian Underwood, reaches the age of eighteen years. Your guardian ad litem recommends that when the shares of each beneficiary have been determined, the same be paid to the individuals entitled or to duly appointed guardians of the estates of those beneficiaries who might still be minors, according to the law of the jurisdictions in which the minor children are domiciled.

5. That it would be ill-advised to require the estate to remain open once the value of each share has been determined with the attendant court costs, premiums on annual undertakings, and whatever other costs might be charged. The apparent intent of the testatrix was to keep the funds from the hands of any children under the age of eighteen years at her death as well as from those who would not reach eighteen years of age until some later date. Payment to a duly appointed guardian would serve the same purpose, could be held in some form of restricted account to be drawn upon only by Court order, and would result in this proceeding's being closed at some earlier rather than later future date.

WHEREFORE, your guardian ad litem concludes:

1. That it is his opinion that all beneficiaries contemplated under Item VI, Subparagraph (c), of whom there are sixteen, should receive equal shares, that is to say one-sixteenth (1/16) each of the personal property to be distributed.

2. The shares of those minors not able to take on their own account be paid to duly appointed guardians according to local law.

3. That these minors be afforded such other and further relief as to the Court may seem appropriate.

[Subscription Omitted in Printing]

John J. Toomey
Guardian Ad Litem
10400 Connecticut Avenue
Kensington, Maryland 20795
933-5485

[Caption Omitted in Printing]

ADDITIONAL POINTS AND AUTHORITIES
IN SUPPORT OF JULIA R. LEACH, LEGATEE

FILED
Apr 25 1969

The question before the Court is: What is meant by paragraph (c) in Item VI of the above Will from the words "An equal subdivision of the remainder x x x", when the same paragraph is followed by three separate subdivisions of legatees? The answer is crystal clear when one looks in the dictionary for the first two words. 1. Equal means "the same measure, quantity, amount or number as another or others (2) identical in mathematical value". The other word, 2. Subdivision means (1) (a) "The act or process of subdividing (b) an instance or example of subdividing. (2) Something produced by subdividing". This requires one more definition: What does subdivide mean? It means "to divide into several parts". (These definitions are from Webster's Third New International Dictionary 1961)

The testatrix meant that the "remainder" or residue of her estate would be subdivided by three named "subdivisions" as named in the Will as (i) (ii) (iii) and each group in the subdivision would share equally. If the three subdivisions were not set up in the Will then these three separate paragraphs would be surplus words. To put it in the reverse: If the testatrix wanted these legatees to share per capita, she would have said (1) per capita, or (2) she would have said that they would share equally by omitting the word "subdivision".

Original Filed in chambers of Judge Robinson
4/25/69 Patrick J. Clarke
Law Clerk

Therefore, "an equal subdivision of the remainder" simply means that those remaining subdivisions (i-ii-iii) are to be subdivided in one, two or three parts and those in that particular group are to share equally. For example, those in (i) being the nieces and nephews are to share equally the amount among themselves from the equal subdivision with (ii) and (iii).

Thus, since Anna Reed predeceased the testatrix since she was "not living at my death", this left only two subdivisions i and ii which means the "remainder" of the estate is to be divided into two parts.

The words used in a Will are to be interpreted according to their ordinary and natural meaning. 57 Am. Jur. 746. Therefore, the two words "equal subdivision" in its ordinary and natural meaning is to subdivide the "remainder" as was done in the Will by three separate groups as i, ii and iii, then those in that group are to share equally.

After considerable research, no similar such words were found. The three cases cited by the guardian ad litem are not in point.

1. Cross v. O'Cavanagh, 21 So. 2nd 473 is not on point since the Will states as follows:

> "I give & bequeath to----my three Sisters Bessie--Margie & Stella--and the heirs of Eva Cross, all my real estate & personal property I die possessed of----To my Sister Minna Craig $1.00 & to my brother James O'Cavanagh $1.00. If at the death of my Sister--Bessie Margie & Stella, what is left of my estate it will go to the heirs of my Sister Eva Cross----..."

This Will does not have any words similar to "An equal subdivision of the remainder". Thus, it is not on point.

2. Agricultural National Bank v. Miller, 316 Mass.

288. 55 NE 2nd 442 the Will was as follows:

> "in equal shares to my children (3 names & to my grandchildren".

The question is whether the grandchildren should take the residuary estate per capita with testator's three children. The Court held that they take 1/4 interest as a class and 1/4 each to the testators three children. This case is similar to the case at bar since the grandchildren take as a class as we maintain the nieces and nephews take as a class. Here the word "subdivision" was not used, but the result was the same.

3. In re Bush Estate, 39 NYS 2nd 633 is not in point since it decided on the words "between" and "among". There is no language in the case at bar.

CONCLUSION

Ithas been often quoted by the Courts that "no will has a brother". Therefore, the Court must look to the intent of the testatrix from the four corners of the Will. Thus, the words "An equal subdivision of the remainder" means that this paragraph is to be subdivided into three paragraphs as was done by the Will in Sections i, ii and iii; then those in the remaining two subdivisions will be divided equally into two parts - one for group (i) and one for group (ii).

Mrs. Leach and her late husband were very close friends of the testatrix and they had befriended her for many years. The nieces and nephews all live a great distance from the testatrix, except for five that live in Maryland. In short, the Leachs were contemporaries as compared to the nieces and nephews.

Mrs. Leach is only asking for what is her part as set up by the Will.

Therefore, she asks that she receive one-half of the residue.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

MEMORANDUM ORDER

FILED
APR 29 1969
D. C.

It is the duty of the Court to use every reasonable effort to effect the intent of a decedent when interpreting a will unless to do so would be contrary to law or public policy. To that end, the entire instrument and the testamentary scheme contained therein must be considered and each part construed with relation to the other parts of the instrument.

In this will the decedent, after providing for a limitation on her funeral and burial expenses, provided in Item V that her Executor should give to her family, relatives and her minister the personal effects "according to his best judgment of my wishes." The inventoried value of such personalty establishes that this personalty had little monetary value. The principal dispositive provision of the will was in Item VI in which testatrix directed the executor to convert the residue into cash and pay that residue in three ways. The direction which gives rise to the principal problem in this action is that which provides

> "(c) An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death:
>
> (i) The children (or their estates if they are deceased at my death) of Edward U. Elam, Arthur F. Underwood, Raymond Underwood,

Martha Underwood Paull, and Ernest Underwood, these named persons being nephews and a niece. If anyone of these children is under 18 years of age at my death, the sum due him (or her) is to be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years.

(ii) Robert L. Leach
2407 37th Street, N. W.
Washington, D. C.

or his wife if he is dead at the time of my death.

(iii) Anne Reed
4828 Reservoir Road, N. W.
Washington 7, D. C."

Anne Reed and Robert L. Leach predeceased testatrix, but Robert Leach was survived by his wife, Julia R. Leach.

Plain words are entitled to their accepted meaning. "Equal subdivision of the remainder" means that after payment of (a) and (b) of Item VI, the remainder shall be divided by the sum of the persons thereafter described namely, the children of her nephews and niece, Robert L. Leach and Anne Reed. Any other construction is inconsistent with the general intent of testatrix as indicated by a consideration of her entire will. The assets of this estate consist of personalty of nominal value and cash. Item V gives the executor broad discretion in the disposition of that personalty to the classes and

individuals therein named. Item VI designates the principal objects of testatrix' bounty, her great nephews and niece and two of her friends. With respect to her friends, no descriptive language or explanation is contained in the will which indicates a special preference over the natural objects of her bounty, her relatives. Where devises or bequests are made to relatives and to non-relatives, unless there is clear intention expressed to the contrary, a construction should not be made that would give preference to the latter. This testatrix did not indicate an intention that her friends should receive an amount equal to that which would be received by the total of all of her relatives.

The intent of this testatrix is clear as to whom and at what age each minor shall become entitled to his bequest, but she cannot control absolutely the manner in which payment is made.

Item V devising the personal effects includes all personalty other than cash. Jewelry is personalty and is to be considered along with the furniture and furnishings.

In consideration of the foregoing, the pleadings herein and argument of counsel, it is by the Court this 15th day of April, 1969,

ORDERED

(1) That the executor herein, Edward Underwood Elam, be and is hereby directed to distribute the remainder of the estate in Item VI of the will to the children of the named nephews and niece and to Julia R. Leach in

equal shares, that is one-sixteenth of said remainder to each.

(2) That the executor be and is hereby authorized to pay to the legally appointed guardians of the estates of minor beneficiaries such sums to which they are entitled.

(3) That the executor be and is hereby authorized to distribute the jewelry inventoried herein as personalty along with furnitute and furnishings as provided in Item V of decedent's will.

Judge

April 25th, 1969
(Date)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of:

HARRIET UNDERWOOD SYMONDS, Deceased

EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,

Appellant

and

JOHN J. TOOMEY,
Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 18 1969

Nathan J. Paulson
CLERK

STUART H. ROBESON
1828 Jefferson Place, N.W.
Washington, D.C.
659-2720

Attorney for Appellant

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

Statement of Issues Presented 1

References to Ruling 2

Statement of the Case 2

Argument:

1. Was the court misled when the Petition of the Executor for Instructions inadvertently misquoted the will of the testatrix 4

2. Did the court err in not properly interpreting the words "an equal subdivision of the remainder" when this paragraph is followed by three separate subdivisions of legatees 9

Conclusion 13

TABLE OF AUTHORITIES

Cases:

*American Security & Trust Co. v. Blair, 63 App. D.C. 170, 70 F.2d 774 (1934) 12

Association of Survivors, et al. v. Larner, 55 U.S. App. D.C. 156, 3 F.2d 201 (1925) 12

Autera v. Robinson, ___ U.S. App. D.C. ___ (Nos. 21802 & 21848, decided June 30, 1969) 8

*Evans v. Ockershausen, 69 U.S. App. D.C. 285, 100 F.2d 695 (1938) .. 11

*Lewis v. Schafer, 61 App. D.C. 167, 58 F.2d 893 (1932) 11

*Rosinski v. Whiteford, 87 U.S. App. D.C. 313, 184 F.2d 700 (1950) .. 5, 7

*Turek v. Mahoney, 407 Ill. 476, 95 N.E.2d 330 6

Statute:

14 D.C. Code § 302 (1967) 5, 7

Miscellaneous:

57 Am. Jur. 746 9

Webster's Third New International Dictionary (1961) 9

*Cases chiefly relied on.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of:

HARRIET SYMONDS, Deceased

Appellee

v.

JULIA R. LEACH,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED*

1. Was the Court misled when the Petition of the Executor for Instructions inadvertently misquoted the will of the testatrix?

2. Did the Court err in not properly interpreting the words "an equal subdivision of the remainder" when this is followed by three separate subdivisions of legatees?

---

*This case has not previously been presented to this Court.

REFERENCES TO RULING

The Memorandum Order of the lower court is found on App. 21 to 24. It is from this order that this appeal is taken.

STATEMENT OF THE CASE

This case came into court when the Executor filed a Petition for Instructions (App. 6 to 10) of the will of the testatrix (App. 1). No oral testimony was given in open court by any witness. Counsel for the executor requested several instructions, but the question taken on this appeal relates only to Item VI (c) (App. 2), which is: whether "An equal subdivision of the remainder" means a division of one-half of the remainder to 15 grandnephews and grandnieces and the other half to Julia R. Leach (appellant), or does it mean the remainder of the residue is to be divided one-sixteenth to each of the legatees?

The pertinent part of the will is as follows:

> "Item VI. All the rest and residue of my estate I direct my executor to sell or otherwise convert to cash and to pay out the proceeds (after deducting all of the above costs and expenses):
>
> (a) $10,000 (Ten Thousand dollars) to the Trustees of the Dumbarton Avenue Methodist Church, Washington, D.C.
>
> (b) Up to Five Hundred dollars ($500) for a new headstone for the grave of my great grandfather Israel Underwood in the cemetery at Ephrata, New York.
>
> (c) An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death:
>
> (i) The children (or their estates if they are deceased at my death) of Edward U. Elam,

> Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood, these these named persons being nephews and a niece. If anyone of these children is under 18 years of age at my death, the sum due him (or her) is to be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years.
>
> (ii) Robert L. Leach
> 2407-37th St. N.W.
> Washington 7, D.C.
>
> or his wife if he is dead at the time of my death.
>
> (iii) Anne Reed
> 4828 Reservoir Road, N.W.
> Washington 7, D.C.

In other words, the question raised by the Petition for Instruction in paragraph 5(A) (App. 8 & 9) was in substance, does "*equal subdivision* of the remander" (and not "*equal division* of the remainder" as erroneously stated in the petition) mean that one-half goes to the fifteen grandnieces and grandnephews and one-half to Julia R. Leach, friend of testatrix or does it mean that each legatee will receive 1/16th of the remainder? Answers were filed to the petition of instructions by the guardian ad litem (App. 16 & 17), affidavit by Amicus Curiae (App. 11 & 12), answer of Ernest Underwood (App. 13 to 16), answer of Petition by Julia Leach (App. 13), and Additional Points and Authorities in Support of Julia Leach (App. 18 to 21).

The Court filed a Memorandum Order (App. 21 to 24) in which the Court said the remainder of the estate shall be divided in equal shares to the children of the named grandnephews and grandnieces and Julia R. Leach (App. 23).

The appellant has filed a timely appeal to this Court.

ARGUMENT

1. Was the Court misled when the Petition of the Executor for Instructions inadvertently misquoted the will of the testatrix?

The Petition of the Executor for Instructions asked the Court (App. 9):

> "Does the 'equal *division* of the remainder' mean a division of one-half of said remainder to the 15 children who are included under *Item VI* (c) (i) and one-half to Julia R. Leach, widow of Robert L. Leach, the beneficiary under *Item VI* (c) (ii) (Anne Reed, the beneficiary under *Item VI* (c) (iii) having predeceased the testatrix), or does it mean a division among said 15 children and Julia R. Leach, that is, one-sixteenth of said remainder to each?"

This question is not properly quoted from the Will. The will says "An equal *subdivision* of the remainder . . ." and not "equal *division* of the remainder." The will sets up three groups which are "(i)" includes 15 grandnephews and grandnieces, "(ii)" which is Julia R. Leach, and lastly, "(iii)" which is Ann Reed who pre-deceased the testatrix, thus not entitled to receive any part of the estate.

Therefore, the Court was mislead by this typographical error in the Petition for Instructions. There is no doubt that this was not deliberate error, as the attorney for the Executor has no personal interest in what any beneficiary would receive. However, such misleading words as "equal *division* of the remainder" could easily and rightfully mislead the Court in erring in its decision.

To compound the mistakes mentioned above, Raymond Underwood, *father of two of the beneficiaries*, filed an "Affidavit by Amicus Curiae" (App. 11 & 12) in which he said:

> "Therefore, as to 5(A) of the Petition I submit that the Will clearly sets forth her intentions that the

> remainder be *divided equally* among the individuals entitled to share it."

He uses the word "divided" five times, plus "dividing the remainder" once, but *never* using the words "equal subdivision" in his affidavit. It is not known whether he had a copy of the will or made his affidavit only from a copy of the Petition for Instructions, but he claims he wrote the will for the testatrix. If he has such a vivid recollection of contents of the will when he prepared this affidavit, surely he would or should have remembered the correct words of "An equal subdivision of the remainder." and not "equal division of the remainder." There is a big difference in the two phrases. Next the Court should notice that Mr. Raymond Underwood is the father of Barbara Underwood Postnicks and Norma Underwood Grasse. (App. 8) who are two legatees in this group.

Therefore, it was an error for the Court to have this affidavit in the record as the Court could have been influenced by such a self-serving declaration, especially since counsel for the appellant did not have an opportunity to take his deposition. Likewise, any testimony by this party is reflected in the fact that his children have substantial financial interest if this residue is divided in 16 equal parts rather than being divided into two groups.

More important is that the Court should not have accepted this affidavit of Raymond Underwood as it is uncorroborated and only a self serving declaration and not supported with any material facts or evidence, but only his opinion, and is not admissible under Title 14 Section 302 of the D.C. Code (1967).

The fact is that no testimony was taken in open court, but it could easily be assumed that the Court was influenced by this uncorroborated affidavit.

In the case of *Rosinski v. Whiteford*, 87 U.S. App. D.C. 313, 184 F.2d 700 (1950) on page 314 the Court said:

> "We think the statute permits a judgment based essentially on the survivor's testimony *if there is other evidence from which reasonable men might conclude that his testimony is probably true.*"

There is no corroboration to the affidavit of Raymond Underwood, only a self serving declaration, thus it should not have been considered by the Court.

The real question is why did the testatrix use the words "equal subdivision of the remainder" with three separate paragraphs "(i), (ii) and (iii)" if the testatrix wanted all to share equally? All the testatrix would have had to say is that all share equally if that was her intention. Now Mr. Underwood wants this court to delete the word "subdivision" and use the words "equal division" or in substance he wants to rewrite her will.

Here the Court said in *Turek v. Mahoney*, 407 Ill. 476, 95 N.E.2d 330 on page 333:

> "The object of construing a will is to ascertain the intention of the testator, *which must be gathered from the words of the will itself*, and the intention so gathered must not be one which may have existed in the mind of the testator apart from such language. Cahill v. Michael, 381 Ill. 45, 45 N.E.2d 657; Norton v. Jordan, 360 Ill. 419, 196 N.E. 475. *Evidence respecting the intention of a testator separate and apart from that conveyed by the language of the will is not admissible for the purpose of interpreting it.* Appleton v. Rea, 389 Ill. 222, 58 N.E.2d 854. *A will cannot be reformed to conform to any intention of the testator not expressed in it, no matter how clearly a different intention may be proved by extrinsic evidence.* Knight v. Knight, 367 Ill. 646, 12 N.E.2d 649; Graves v. Roe, 246 Ill. 76, 92 N.E. 601, 30 L.R.A. (n.s.) 303." (Emphasis supplied)

Therefore, such evidence of this affiant is not admissible as the interest of the testatrix "must be gathered from the words of the will itself" and the will cannot be reformed to conform to any intention of the testatrix not expressed in it no matter how clearly a different intention may be proved by extrinsic evidence.

Likewise, the affidavit of Ernest Underwood, *the father of four of the beneficiaries* (App. 8) who would inherit under this residue clause, was received in this record also (App. 13 to 16). Here again he misquoted the will by saying in part in his second paragraph of the Answer of Ernest Underwood (App. 13 & 14):

> "The language of the Will concerning Item VI (c) "equal *division* of the remainder" clearly indicates and imparts that the division should be equally among the 15 children . . . and Julia R. Leach, that is, one-sixteenth (1/16th) each."

This again is an erroneous affidavit which could have misled the Court in its decision. He used the word "division" three times and never used "subdivision." Likewise, this also is only a self serving declaration and not supported with any material facts or evidence but only his opinion. This affidavit also should not be admitted under Title 14 Section 302 of D.C. Code (1967) and *Rosinski v. Whiteford, supra.*

The Court also could have been influenced by the Answer of John J. Toomey, Guardian ad Litem, which stated (App. 16 paragraph 3):

> "that the balance of cash or other personal property passing through Item VI, Subparagraph (c) *should pass equally* among the fifteen (15) children . . . as well as to Julia R. Leach, surviving wife of Robert L. Leach. In other words, the fifteen children and Julia R. Leach should receive the same amount, one-sixteenth (1/16) each."

No material reasons were given by the Guardian ad Litem as to why he reached such an opinion. He only uses the words "should pass equally" without regard to the statement in the Will which is "an equal subdivision of the remainder."

Even if the affidavits of the two Underwoods were admitted and considered by the Court, such statements are not acceptable mode of proof of facts in issue. In a very recent case decided by this Court in *Autera v. Robinson*, Nos. 21802 & 21848, ___ U.S. App. D.C. ___, decided June 30, 1969, there was a motion filed with affidavits to decide whether an oral agreement was made to settle a personal injury suit. The lower court held from the affidavits that an agreement was reached, but this court reversed the lower court. The court said:

> "Had *no factual disputes* arisen to plague the parties' substantive rights, we would perceive no difficulty in the judge's acceptance, as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others." (Emphasis supplied)

However, there are *"factual disputes"* as the executor who misquoted the will by saying "*equal division* of the remainder" rather than "an *equal subdivision* of the remainder." The Court reversed the lower Court since there was no opportunity afforded anyone to test any representation by cross-examination. The Court said:

> "The opportunity to judge credibility was nonexistent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. Without these twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unacustomed quality of artificiality."

Thus the appellant should have a right to cross examine the two Underwoods on their affidavits by a rehearing of this case.

It is reasonable to assume the Court could have been mistakenly influenced in reaching its decision after reading four such affidavits as follows: Petition of Executor signed and sworn to by Edward Underwood Elam—in paragraph 5 he misquoted the will when he stated "*equal division* of the remainder" (App. 9); (2) Affidavit of Raymond Underwood also misquoted the will (App. 11 & 12) which used the word "divided" five times and "dividing" once and never used "subdivision," and he claims he drew the Will; (3) Answer, Ernest Underwood in an affidavit misquoted the Will and used "division" three times and never used "subdivision" (App. 13 & 14); (4) Answer of Guardian ad Litem when is signed and sworn to, but he thinks the residue "should pass equally" without any definite reasons (App. 16). To put it mildly: *It is most reasonable to assume the lower Court was misled from such an array of misquoted affidavits.*

2. Did the court err in not properly interpreting the words "an equal subdivision of the remainder" when this paragraph is followed by three separate subdivisions of legatees?

To find out the intent of the textatrix, one should look from the four corners of the Will. The words used in a Will are to be interpreted according to their ordinary and natural meaning, 57 Am. Jur. 746. Thus, "an equal subdivision of the remainder" requires us to look for the definition of "subdivision" and "equal." *Subdivision* means (1) (a) "The act or process of subdividing, (b) an instance or example of subdividing. (2) Something produced by subdividing." This requires one more definition: What does *subdivide* mean? It means "to divide into several parts." Also, what is meant by *equal*? It means "(1) "the same measure, quantity, amount or number as another or others, (2) identical in mathematical value." Above definitions are from Webster's Third New International Dictionary 1961.

Therefore, "equal subdivision" means that the "remainder" is to be subdivided into three paragraphs which are so stated in the will as paragraph "(i)" for 15 grandnephews and grandnieces "(ii)" which is the appellant and "(iii)" which is Anne Reed who predeceased the testatrix: therefore, she will not share in this will. "Equal subdivision" means that the "remainder" is to be subdivided equally among the two groups or classes. *"Equal subdivision" would, therefor, imply and mean equal groups and not equal parts.*

The court erred by omitting the word "subdivision" when this item was interpreted to mean that the "remainder" was "equal" among the legatees in three subdivisions of (i), (ii), and (iii).

These four simple words mean just what the Will said it meant. The three "subdivisions" were to be "equally" divided into three groups and divided equally in each respective group: therefore if the legatee in paragraph (iii) predeceased the testatrix when Anne Reed died as the will said "if living at my death" (App. 2 and 3), this paragraph would lapse and the "remainder" would be divided into two "subdivisions" of (i) and (ii) which is one-half to the grandnephews and grandnieces, and one-half to the legatee, Julia Leach. Any other interpretation would be omitting the word "subdivision." and this is the error of the lower court.

The lower court said in the Memorandum Order that "With respect to her friends, no descriptive language or explanation is contained in the will which indicates a special preference over the natural objects of her bounty, her relatives." (App. 23)

This is not true as "descriptive language or explanation is contained in the will." The words are "equal subdivision" by each group being separated in a separate paragraph to show it was subdivided since there was a difference in numbers involved in the two paragraphs. Any other interpretation would be to rewrite the

will by omitting the "descriptive" word "subdivision," and if "subdivision" were omitted, then it would read "equal remainder" which was incorrectly interpreted by the lower court.

In the case of *Evans v. Ockershausen*, 69 U.S. App. D.C. 285, 100 Fed. 2d 695 (1938) at page 290, the court said:

> "This will must be interpreted so as to effectuate the true intent of the testator as expressed in the will. This is the primary and basic rule to which all others must yield."
>
> "It is *not* to be construed by isolated expressions, but must be construed in its entirety."

Also on page 292:

> "The primary significance of words should ordinarily attach and does attach, unless it is manifest from the will itself that other definitions are intended. *Weight and meaning must be given to every word used if they make any sense at all. None are to be deleted and none added*, for men make their own wills, nor should we search out obscure or *recondite possibilities in simple words.*"
>
> In construing a will the Court said on page 295: "This language must be given its ordinary meaning. Lewis v. Schafer, supra and therefore *it must be held to show the intent of the testator unless other language in the will definitely contradicts it*." (Emphasis supplied)

As stated in *Lewis v. Schafer*, 61 App. D.C. 167, 58 F.2d 893 (1932), the Court said in substance that if the language of the testator's will is plain and unambiguous, then it is not necessary for construction of the will according to technical rules. It is just plain language when testatrix stated she wanted to subdivide the remainder of her estate into three groups and each group would share equally,

otherwise, there would be no reason to set up three separate groups as (i), (ii) and (iii) if she did not want to subdivide the remainder.

Also in *American Security and Trust Co. v. Blair*, 63 App. D.C. 170, 70 F.2d 774 (1934) the Court said:

> "The law recognizes the right of the owner of property to dispose of it by will. Inasmuch as that instrument speaks when the voice of the testator is stilled by death, its provisions must be the guide of the court in determining the testator's intent. Where the language of the will is unambiguous and no positive rule of law is violated, the intent ought to be given effect; and it will be assumed, in the absence of fraud or undue influence, that the disposition actually made by the testator represented his intention."

Here the language is unambiguous and no positive rule of law is violated, therefore, the court should carry out the intent of the of the testatrix by subdividing the remainder of her estate into two groups remaining, one to the grandnephews and grandnieces and the other to Julia Leach.

In the case of *Association of Survivors, et al v. Larner*, 55 U.S. App. D.C. 156, 3 F.2d 201 (1925) on page 158, in speaking of deleting a word, the Court said "that she would not have deleted from the bequest the only word calculated to impose such a limitation." It is the same situation here if the word "subdivision" would be "deleted" it would change the meaning of the intent of the textatrix.

On the same page in the above case the court said:

> "Reading the will as a whole, there is nothing to raise a doubt as to the intent of the testatrix, and to permit the introduction of extrinsic evidence as to that intent would be for the court to make a new will."

Thus, it would allow the Court to make a new will "to allow extrinsic evidence such as the affidavits filed by Raymond Underwood and Ernest Underwood to be admitted into the record.

Also in the same case and same page the Court said:

> "While no rule of universal application has been formulated, the authorities leave no room for doubt that certain conditions must be present to warrant the introduction of extrinsic evidence; and in all cases in which such evidence has been received it was utilized only for the purpose of interpreting something actually written in the will and never to add provisions to the will. For example, ambiguity may arise when a will names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that equally well answer such name or description. In such a case, it is apparent that extrinsic evidence is not only useful, but indispensable, to a proper interpretation of the will."

Thus, the court leaves no doubt that for the introduction of extrinsic evidence (as for example, the affidavits of the two Underwoods) can be admitted only to interpretating something actually written in the will, and *never* to add provisions to the will, and the example given was when there is a gift to a person named in the the will, and there are two such persons. There was no ambiguity in this will as to the persons, therefore, extrinsic evidence should not have been filed in the record to mislead the lower court.

CONCLUSION

The lower court was misled by the Petition for Instructions plus the two Underwood affidavits which misquoted the will by saying the will called for the residue to be "equal division" rather than "equal subdivision" among the two groups. Therefore, since

it is crystal clear that there is no ambiguity in this will, the residue should be divided equally between the fifteen grandnephews and grandnieces on the one part, and the other half to Julia R. Leach, as any other interpretation would be to rewrite the will and delete the word "subdivision."

At least, the court should allow a new hearing on the grounds that the misquoted will together with the improperly admitted affidavits caused the court to misinterpret the intent of the testatrix.

Respectfully submitted,

Stuart H. Robeson
1828 Jefferson Place, N.W.
Washington, D.C.
Attorney for Appellant

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of
HARRIET UNDERWOOD SYMONDS, Deceased
EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,

Appellant

and

JOHN J. TOOMEY,
Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ~~APPELLANT~~ Appellee
JOHN J. TOOMEY, Guardian ad Litem for Minor Defendants

JOHN J. TOOMEY
10400 Connecticut Avenue
Kensington, Maryland 20795
Guardian ad Litem for Minor Defendants

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 4 1969

Nathan J. Paulson
Clerk

Washington, D. C. THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT:

1. Did the testatrix attach special meaning to the words "equal subdivision of the remainder" when she bequeathed this portion of her estate 2

2. Did the testatrix mean for the children of her niece and nephews each to take a larger individual share than that to be given to Robert L. Leach or his wife, and Anne Reed 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES:

Walker v. Thomas, et al., 64 App. D.C. 148, 75 F.2d 667 (1935) 3

In re Walsh's Estate, (N.Y.) 204 Misc. 243, 121 N.Y.S.2d 554 (1953) 4

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of
HARRIET UNDERWOOD SYMONDS, Deceased
EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,

Appellant

and

JOHN J. TOOMEY,
Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ~~APPELLANT~~ appellee
JOHN J. TOOMEY, Guardian ad Litem
for Minor Defendants

STATEMENT OF ISSUES PRESENTED

1. Did the testatrix attach special meaning to the words "equal subdivision of the remainder" when she bequeathed this portion of her estate?

2. Did the testatrix mean for the children of her niece and nephews each to take a larger individual share than that to be given to Robert L. Leach, or his wife, and Anne Reed?

This case has not previously been before this court.

STATEMENT OF THE CASE

Your Guardian ad Litem is satisfied that the Statement of the Case as appears in the brief of Appellant is in accord with the facts as your Guardian ad Litem understands them.

SUMMARY OF ARGUMENT

1. The Court did not err in its ruling that the testatrix attached no particular significance to the words "equal subdivision of the remainder" as the same are employed in Item VI of the Will.

2. The testatrix favored the children of her niece and nephews over the other individuals named in the remainder of Item VI of said Will.

ARGUMENT

1. The Court did not err in its ruling that the testatrix attached no particular significance to the words "equal subdivision of the remainder" as the same are employed in Item VI of the Will.

Nowhere in Item VI does the testatrix give any hint that she intended to attach to or give some specialized meaning to the words "equal subdivision of the remainder". After all, a "subdivision" is nothing more than the result of breaking into more parts something which has already been broken away from the whole.

If particular significance is to be attached to the phrase "equal subdivision of the remainder", it is just as logical to say the testatrix meant this portion of the residue of her estate, it being already a part of her total estate, was then to be divided further among the individuals enumerated later in three separate categories, each of the individuals to receive the same as the other.

After all, the fact that a word or phrase might be inconsistent with the general intent as shown by the will when taken as a whole, may justify the court in assuming that another meaning was intended. As this Court stated in the case of *Walker v. Thomas, et al.*, 64 App. D.C. 148, 75 F.2d 667 (1935), speaking at page 149:

> "The law in this jurisdiction is that the intention of the testator is the basic and fundamental rule in the construction of wills, and the intention should be determined by construction of the whole will and not from detached paragraphs; and where the intention is apparent, it should be given effect—and this is true—even though to do so involves the rejection of the literal meaning of particular words."

Nowhere does she indicate that the three classes or groups are each to receive in total the same amount as the other. Her estate had already been divided, part being employed for debts and funeral expenses, part would be paid out in the form of a charitable bequest and for a headstone, and there was left a portion or division of the remainder to be paid to the children of the niece and nephews, Robert L. Leach or his wife, and Anne Reed.

The remainder, as a division of the estate, was finally being "subdivided" in order to dispose of whatever balance of assets remained.

The testatrix then directs that this portion of the residue of her estate, and she calls it "subdivision of the remainder" shall be paid out in the form of cash bequests, but in equal fashion because she places the word "equal" before "subdivision of the remainder". Those who are to receive this "equal subdivision" are then enumerated.

2. The testatrix favored the children of her niece and nephews over the other individuals named in the remainder of Item VI of said Will.

Your Guardian ad Litem is convinced the testatrix intended the children of her niece and nephews to take a greater share of her estate, in total, than would be paid to Robert L. Leach, or his wife, or Anne Reed, or the survivor of them, because of the manner in which she directs the distribution to be made.

Item VI (c) begins "an equal subdivision of the remainder, to be paid out as cash bequests, *if living at my death*:".*

Immediately thereafter and at the beginning of the very next paragraph in which she remembers the children of her niece and nephews, the following language is employed:

"(i) The children (*or their estates if they are deceased at my death*)* of . . . ." and she names the niece and nephews whose children are to be remembered. It is significant that neither Robert L. Leach, or his wife in the event of his death, or Anne Reed, is to benefit directly or through his own estate unless he or she be living at the time testatrix herein died. This is not so for the children of the niece and nephews, since each of the children, or his estate, was to receive his share whether living or deceased. It is equally certain that had neither Robert L. Leach or his wife, or Anne Reed, survived testatrix herein, this entire portion of the estate could have been divided among the children of the niece and nephews, regardless of their ages, in equal shares.

The Task of the Court is to ascertain testamentary intent and give it effect, but not to create an intent where none appears. As has been stated in the case of *In re Walsh's Estate*, (N.Y.) 204 Misc. 243, 121 N.Y.S.2d 554 (1953):

---

*Emphasis Supplied.

> "If the testatrix expressed herself in ambiguous language, we endeavor to impute to the words used such meaning as will conform to the intention of the testatrix viewed in the light of the pattern upon which the will was executed."

Testatrix knew, at the time she executed the Will, that sixteen children of her niece and nephews were then living, that there was a likelihood more might be born before her demise. Therefore, she knew that, as a group, they would take a disproportionate share of her estate if each individual were to take the same as Robert L. Leach or his wife, and Anne Reed. There is nothign to indicate she intended each legatee, named or otherwise, to take anything but an equal share with the other.

Absent any language which might lead to the conclusion testatrix meant for the children of her niece and nephews to share 1/3 of her estate, Robert L. Leach or his wife to take 1/3, and Anne Reed to take the last 1/3, if all survived testatrix, it seems clear she meant everyone, family and friends, to receive exactly the same amount. The individuals appear to have been placed in categories merely to identify and locate them when the proper time came because, except for the children of the niece and nephews, the other groupings appear from the record to be unrelated to each other.

Your Guardian ad Litem feels that, had the testatrix intended for Robert L. Leach or his wife, and Anne Reed, to receive each an equal amount to the total paid to all the children of her niece and nephews, it would have been a simple matter for the testatrix to offer some explanation that the amounts so paid were in return for some considerations paid during life, or some extraordinary favors rendered testatrix prior to the date of the execution of the Will.

CONCLUSION

The lower court did not err nor was it misled in its interpretation of the words employed by testatrix in Item VI of her Will. For the reasons enumerated above, its memorandum order should be affirmed.

Respectfully submitted,

JOHN J. TOOMEY
10400 Connecticut Avenue
Kensington, Maryland 20795
Guardian ad Litem for Minor Defendants

United States Court of Appeals
for the D[illegible] Circuit

FILED AUG 18 1969

Nathan J. Paulson
Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of
HARRIET UNDERWOOD SYMONDS, Deceased
EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,
Appellant

and

JOHN J. TOOMEY,
Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ESTATE OF HARRIET UNDERWOOD SYMONDS, DECEASED, APPELLEE

ALVIN O. WEST
815 15th Street, N.W.
Suite 500
Washington, D.C. 20005
Attorney for Appellee, Estate of Harriet Underwood Symonds, Deceased

Washington, D. C. • THIEL PRESS • 202 • 393-0625

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

CASES:

Dean v. Tusculum College, 90 U.S. App. D.C. 304, 195 F.2d 796 (1952) 5

*Hilton v. Kinsey, 88 U.S. App. D.C. 14, 185 F.2d 885 (1950) 6

*Sherman v. American Security & Trust Company, 57 App. D.C. 273, 20 F.2d 446 (1927) 6

MISCELLANEOUS:

Webster's New International Dictionary of the English Language, Second Edition Unabridged, 1961 4

*Cases chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,147

In Re Estate of
HARRIET UNDERWOOD SYMONDS, Deceased
EDWARD UNDERWOOD ELAM, Executor

v.

JULIA R. LEACH, Legatee,

Appellant

and

JOHN J. TOOMEY,
Guardian *ad Litem* for Minor Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ESTATE OF HARRIET UNDERWOOD SYMONDS, DECEASED, APPELLEE

STATEMENT OF ISSUE PRESENTED

Where the residuary clause of a will provides for "An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death," followed by three separate subparagraphs numbered respectively "(i)", "(ii)", and "(iii)", and subparagraph (i) describes

a group which includes 15 grandnephews and grandnieces of decedent, subparagraph (ii) names a neighbor of decedent (who predeceased her) or the neighbor's wife, who is Julia R. Leach, appellant herein, and subparagraph (iii) names decedent's nurse, who predeceased decedent, did the District Court err in directing the executor to distribute the remainder of the estate in equal shares to the grandnephews, grandnieces, and Mrs. Leach, that is, one-sixteenth to each, rather than one-half to the grandnephews and grandnieces and one-half to Mrs. Leach?

This case has not previously been before this Court.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted by this appellee.

SUMMARY OF ARGUMENT

Appellant's argument that the court below was misled by a misquotation, "division" for "subdivision" in the Petition for Instructions, is without substance, as there is no indication in the memorandum order that the court was misled, and the difference in meaning between "division" and "subdivision" could not have affected the interpretation of the will. The court below interpreted the will in accordance with settled rules of construction, drawing the intent of testatrix from a consideration of her entire will and, in the absence of a clearly expressed intention to the contrary, adopting the interpretation which prefers the family of testatrix to non-relatives.

ARGUMENT

The Executor of the Estate of Harriet Underwood Symonds sought the instructions of the District Court because of uncertainty as to specified provisions of testatrix's will involving distribution of the residue (App. 6), and in his representative capacity he has no obligation to contend for any particular interpretation over another. However, the Executor does feel some obligation to present an argument supporting the decision of the court below, especially in view of appellant's contention that the court below was misled by an inadvertent misquotation of the will at one point in the Executor's petition (Appellant's Br. 4-9).

The portion of Mrs. Symonds' will involved in this appeal is as follows (App. 2-3):

> Item VI. All the rest and residue of my estate I direct my executor to sell or otherwise convert to cash and to pay out the proceeds (after deducting all of the above costs and expenses):
>
> (a) * * *
>
> (b) * * *
>
> (c) An equal subdivision of the remainder, to be paid out as cash bequests, if living at my death:
>
> (i) The children (or their estates if they are deceased at my death) of Edward U. Elam, Arthur F. Underwood, Raymond Underwood, Martha Underwood Paull, and Ernest Underwood, these these [sic] named persons being nephews and a niece. If anyone of these children is under 18 years of age at my death, the sum due him (or her) is to be paid out to him (without interest accrued) by my executor when he (or she) arrives at 18 years.

(ii) Robert L. Leach
2407–37th St. N.W.
Washington 7, D.C.

or his wife if he is dead at the time of my death.

(iii) Anne Reed
4828 Reservoir Road N.W.
Washington 7, D.C.

The Petition of Executor for Instructions quoted this portion of the will correctly (App. 6-7). It then set forth the information about decedent's heirs at law and next of kin, listed the 15 grand-nephews and grandnieces who are included under subparagraph (i), and stated that Robert L. Leach and Anne Reed had both predeceased testatrix, while Julia R. Leach, wife of Robert L. Leach, had survived testatrix (App. 7-8).

Thereafter, in stating the question as to how the residue should be divided among these beneficiaries, the inadvertent misquotation was made, the phrase "equal subdivision of the remainder" from the will being misquoted as "equal division of the remainder" (App. 9).

Appellant's argument that the court below was misled by this misquotation (Appellant's Br. 4-9) is without substance. The memorandum order of the court below quotes the phrase correctly in both instances where it is used (App. 21, 22), and the other portions of the order give no indication that the court was misled. Moreover, the difference in meaning between "division" and "subdivision" could not possibly have any bearing on the question whether Mrs. Leach should receive one-half or one-sixteenth of the residue. Webster's New International Dictionary of the English Language, Second Edition Unabridged, 1961, defines "subdivide" as, "To divide the parts of into more parts; to divide again, as what has already been divided. . . ." Thus "subdivision" indicates only that the division

process is at a secondary stage, and does not indicate a particular formula.

After quoting the pertinent provision of the will, the court below said (App. 22):

> Plain words are entitled to their accepted meaning. "Equal subdivision of the remainder" means that after payment of (a) and (b) of Item VI, the remainder shall be divided by the sum of the persons thereafter described namely, the children of her nephews and niece, Robert L. Leach and Anne Reed. Any other construction is inconsistent with the general intent of testatrix as indicated by a consideration of her entire will. . . .

Quite clearly the court was observing the well-settled rule that the cardinal principle in the construction of wills is that the intention of the testatrix must prevail, and that this intention must be drawn from the four corners of the will. E.g., *Dean v. Tusculum College*, 90 U.S.App.D.C. 304, 305, 195 F.2d 796 (1952).

The court below continued its analysis of Item VI of the will as follows (App. 23):

> . . . Item VI designates the principal objects of testatrix' bounty, her great nephews and niece and two of her friends. With respect to her friends, no descriptive language or explanation is contained in the will which indicates a special preference over the natural objects of her bounty, her relatives. Where devises or bequests are made to relatives and to non-relatives, unless there is clear intention expressed to the contrary, a construction should not be made that would give preference to the latter. This testatrix did not indicate an intention that her friends should receive an amount equal to that which would be received by the total of all of her relatives.

This analysis shows that again the District Court was following an established rule of construction, that where the intent of the testatrix is in doubt, the doubt should be resolved in favor of the interpretation which prefers the family of the testatrix to non-relatives. *Hilton v. Kinsey*, 88 U.S.App.D.C. 14, 19, 185 F.2d 885 (1950); *Sherman v. American Security & Trust Company*, 57 App. D.C. 273, 275, 20 F.2d 446 (1927). As this Court said in the *Sherman* case (57 App.D.C. 273, at 275):

> It is unnecessary to dwell upon the elementary principles pertinent to the construction of wills, further than to suggest that if the present case were sufficiently close to invade the realm of doubt, it would be the duty of the court to resolve the doubt in favor of the kindred of the testator rather than the college. This rule of construction is concisely stated in Schouler on Wills (5th Ed.) § 479, as follows: "It may be safely laid down that, of two equally probable interpretations of a will, that should be adopted which prefers the family and kindred of the testator to utter strangers. . . ."

CONCLUSION

For the foregoing reasons, the memorandum order of the court below should be affirmed.

Respectfully submitted,

ALVIN O. WEST
815 15th Street, N.W.
Suite 500
Washington, D.C. 20005
Attorney for Appellee,
Estate of Harriet Underwood Symonds,
Deceased